SUPREME COURT, U. S.

No. 898

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE, THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Appellants,

—v.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees,

and

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., *et al.*,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANTS' BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

JOHN F. DONELAN
JOHN M. CLEARY
JOHN H. CALDWELL
914 Washington Building
Washington, D. C. 20005

Attorneys for Appellant, The National Industrial Traffic League

ARTHUR A. ARSHAM
233 Broadway
New York, N. Y. 10007

JOHN J. C. MARTIN
685 Third Avenue
New York, N. Y. 10017

Attorneys for Appellants, The National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference

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Pursuant to Rule 16(4) of the Rules of this Court, appellants submit this brief in opposition to motions filed by the appellees to affirm the judgment of the district court.

Statement

Contrary to the decision of the district court and argument of the appellees, this case presents no issue involving the Commission's discretionary power to suspend rate schedules. Very much in issue are the meaning and effect of an order of suspension once the Commission has exercised its discretionary authority by ordering suspension of rate schedules. Altogether inapposite are *Arrow Transportation Company* v. *Southern Railway Co.*, 372 U.S. 658, and similar cases, relied on in the district court's opinion and in appellees' argument as dispositive of the suit. The action brought by appellants thrusts into critical focus, language of the statute (49 U.S.C. § 316(g)), substantially restated in the suspension order, that articulates the legislative purpose to "suspend the operation of such schedule and defer the use of such rate". The question is whether a suspension order, once entered by the Commission, impinges only on the schedules in which the rates are published or on the rates themselves so that carriers who elect not to defend and who cancel the suspended schedules are precluded from publishing the identical rates whose use was ordered deferred by the unrevoked suspension order.

Of the substantiality of this question there can be no doubt. The challenging problem evoked by the question limned is limited by events that were enacted here. Faced with the Commission order of suspension, the carriers announced:

> "please be advised that member carriers do not choose to defend the general increases under suspension by order of the Commission."

They thereupon cancelled the suspended schedules. Immediately thereafter (in the case of Rocky Mountain, without waiting for the effective date of the cancellation supplement to arrive) they republished the identical rates. The Commission's order which in terms suspended *operation* of the schedules and deferred their *use* was unrevoked, unmodified in any particular, and in full force and effect. In light of the district court's holding that the suspension order was *not* outstanding (JS 4a) it seems appropriate to emphasize that on the date the rates were republished, and for 19 days thereafter, nothing had been done even with respect to discontinuance of the investigation proceeding. The schedules when tendered for filing were thus palpably in violation of the suspension order. As held by the Commission in *Cancellation of Joint Fares Between District of Columbia and Nearby Virginia,* 47 M.C.C. 205, 208, the schedules should have been rejected as illegal—a course apparently acknowledged as proper by US-ICC (Motion, p. 6).

Appellants moved before the Commission to reject the offending schedules. On August 15, 1967, when the petition to reject the schedules was filed, there was no order of discontinuance in existence; the schedules were undeniably illegal; the petition seeking rejection was incontrovertibly well-founded. Yet the Commission arbitrarily refused to entertain the petition to reject the schedules and it was "passed to the Commission's files without action" (JS 17a). If, as appellants suggest, the schedules were illegal, the Commission's function, indeed its duty, was to strike them from its files. There was no need in this suit to ask or seek suspension of the republished rates and appellants do not do so.

The question of statutory construction evoked by these events eluded the district court and is avoided in the motions to affirm. US-ICC cite no case that interprets the critical phrase on which section 316(g) centers—"suspend the operation of such schedule and defer the use of such rate". The question, of obvious substantiality, is one of first impression and merits interpretive study and resolution. In their motion, US-ICC prefer to rest their argument on the dubious thesis that an order discontinuing the investigation proceeding—made after the rates were republished—may be deemed to have revoked the suspension order and may be given retroactive effect to legitimatize the republished schedules.

Argument

1. The threshold statement made by US-ICC in their motion to affirm reveals a basic misconception that infects their argument and, in the end, is fatal to the conclusion they advocate. Of the orders initially issued by the Commission which suspended the carriers' rate schedules, they say (p. 2):

> "although the orders were annulled by the Commission when the motor carriers cancelled the schedules, appellants (shippers) sued to 'enforce' them."

But, the order of suspension was . . .

> not annulled;
>
> not annulled when the carriers cancelled the schedules;
>
> not annulled when the carriers republished the rates.

Clearly visible in the chronology (JS 6) is this sequence of events:

suspension order—July 12th;
cancellation of schedules (published)—July 20th;
republication of the rates—July 27th;
order of discontinuance—August 16th.

It is thus unmistakably plain that on July 27, 1967, when the carriers republished the rates, the order of suspension stood unrevoked and was unmodified even by the order of discontinuance subsequently issued.

The statement of US-ICC includes an unwarranted characterization of the carriers' purpose in republishing the suspended rates. They say (p. 2):

> "Recognizing that they had not sufficiently supported the lawfulness of the proposed rates, the tariff bureaus notified the Commission that, pursuant to the Commission's standing Special Permission No. M-94200 (J.S. 15a-16a), they were cancelling the schedules."

US-ICC seem to be suggesting that the tariff bureaus communicated to the Commission an intention to cancel the schedules in order to republish the same rates with stronger supporting data. This is wholly at variance with the record facts. The reference to JS 15a-16a is merely to the reproduced standing order of the Commission that permits a carrier whose schedule is suspended to cancel the suspended matter on ten days' notice. No reference is supplied to any letter or notice that the carriers sent to the Commission revealing their purpose. On the contrary, the only notification of which the public had any knowledge is that quoted above announcing that the carriers "do not choose to defend the general increases under suspension". So far from suggesting an intention to con-

tinue to support the suspended rate increases, their notice reveals an election to abandon their defense.

2. US-ICC argue (pp. 4-5) that appellants have mounted an attack on the Commission's "sole and exclusive power" with respect to suspension of the republished rates. But appellants' complaint is directed, not to a suspension order that the Commission declined to enter, but to the suspension order that the Commission did enter. Authority to suspend is indeed reposed in the administrative discretion of the Commission. The same cannot be said of authority to *enforce* an order of suspension. The notion that this is a power, exercisable in the uncontrolled discretion of the Commission, is repugnant to the administrative process if not precluded by statutory definition of suspension as Commission action to "defer the use of such rate". The position urged by US-ICC underscores the substantiality of the third question posed by this appeal—is enforcement of a suspension order, as distinguished from issuance of such an order, a matter committed to the discretion of the Commission and not subject to judicial review?

3. US-ICC assert that the order of suspension was "clearly annulled" when the Board entered its order discontinuing the investigation proceeding (p. 4). Difficulties with that position are multiple: (1) the order of discontinuance was handed down, not by the Commission or by a division of the Commission, but by the Board of Suspension to which had been delegated authority to discontinue an investigation proceeding upon cancellation of suspended schedules, but not to vacate an order of suspension; (2) authority to vacate a suspension order was

reserved to the entire Commission as a plenary power or delegated to Division 2 under the appeal procedure established by Rule 200 of the Commission's Rules of Practice (JS 12a); (3) the order of discontinuance was issued by the Board of Suspension after the rates were republished, not before.

US-ICC's position in this respect highlights the substantial nature of the second question presented by this appeal—whether an order discontinuing the investigation proceeding entered by an employee board of the Commission can be deemed effective to vacate the Commission's order of suspension deferring the use of the rates.

US-ICC appear to recognize the difficulty of a position that rests on nullification of an order of suspension under circumstances when the rates under suspension were republished at a time when the order of discontinuance was not in existence. They speak of the status of the suspension order during that period as not "formally" vacated (pp. 5-6) as if it were possible through some undisclosed "informal" means to impart corporeal existence to something wholly invisible.

US-ICC plainly must overcome the dilemma posed by absence of the order discontinuing investigation on the date when the carriers republished the suspended rates. To extricate their argument, US-ICC focus attention on the effective date of the republishing schedules rather than the date of their issuance. This expedient can scarcely suffice. How could it be known on July 27th when the carriers republished the rates that were under suspension if or when an order of discontinuance would be issued by the Commission? On that date the cancellation supple-

ment had not even become effective. The standing Special Permission that authorized carriers to cancel a suspended schedule contained the proviso that the permission so conferred did not "waive or modify any outstanding formal order of the Commission" (JS 15a-16a). On July 27th the carriers, by their act of republication, flew in the face of an outstanding order of suspension that deferred the use of the rate to February 14, 1968. The schedules as presented were illegal. The Commission was called on by appellants' petition to reject them. The Commission passed the petition to its files without action. These infirmities were fatal to republication of the rate increases. They were never cured and could never be cured by subsequent issuance of the order of discontinuance. The schedules, illegal when filed, could not be legitimatized by subsequent entry of the order of discontinuance. That date—August 16, 1967—failed to provide the time needed for statutory compliance by schedules, marked to take effect August 29, 1967, with the mandate of 49 U.S.C. § 317 (c) requiring 30 days' notice of any changes in rates.

It is for these reasons that the ultimate argument presented by US-ICC is not sustainable. They misapprehend the gravamen of this complaint, viewing it as a bid for judicial review of the Commission's refusal to suspend the republished rates. US-ICC would relegate appellants to exhaustion by means of a formal complaint. Appellants have invoked the jurisdiction of the district court, not to review the Commission's refusal to suspend, but to deal with its inaction in the face of violations of the order that did suspend. The court was asked to implement § 10(e) of the Administrative Procedure Act which requires the reviewing court to compel agency action

unlawfully withheld, to set aside agency action found arbitrary or not in accordance with law and without observance of procedure required by law. The argument of US-ICC supports the substantiality of the fifth question presented by this appeal—may parties aggrieved by Commission action obtain mandatory injunctive relief based on enforcement of the terms of an outstanding suspension order or are they required to suffer rates effected in contravention of the suspension order while exhausting remedies under formal complaint procedure?

4. The motion of US-ICC includes argument that tends to lend force to the essentiality of the interpretation question that inheres in Section 316(e). They say (p. 6):

> "Furthermore, the suspension order was not directed at the proposed new rates in the abstract, but rather was entered upon the record made in the original proceeding. There is no sound reason why the discretion to suspend or not to suspend new schedules must be automatically pre-empted by a prior decision on rates of the same level;"

These alternative consequences are hinged to the meaning that must be imparted to "suspend the operation of such schedule and defer the use of such rate". The argument of Pacific Inland Bureau (pp. 3-4) serves to concretize the problem of statutory interpretation presented by this appeal, i.e., does Section 316(e) speak to the schedules that are suspended or the rates contained in the schedules? Pacific Inland declares that it makes no difference that the order of termination was issued by the Board of Suspension rather than Commission when the Board has authority to issue the order (p. 4). This asserts as a fact something that is very much in issue in this case. The

Board was vested with authority to enter an order of discontinuance, not to vacate an order of suspension.

The argument made at page 3 merits special comment. Pacific Inland says:

> "The effect of the dismissal was to wipe the slate clean and leave the carriers free to publish and file at any time such new rates as they considered proper—whether higher than, lower than, or the same as, the rates cancelled."

On August 7th when Pacific Inland did "publish and file" new rates, the slate was not wiped clean, absent an order discontinuing the investigation. That order was issued August 16th and served August 22nd. Responding to the empirical view with which a tariff bureau would be expected to be familiar, Pacific Inland (unlike US-ICC) correctly describes the significant acts of the carriers as the *publishing* and *filing* of the new schedules.

5. Pacific Inland questions the viability of the suspension order in the presence of an order discontinuing the investigation proceeding. This point is dealt with at JS 9-10. It merits this additional comment. At page 4 Pacific Inland argues that if no investigation is instituted, there can be no suspension, citing *Wisconsin* v. *F.P.C.*, 373 U.S. 294, and *Eastern Air Lines* v. *C.A.B.*, 294 F. 2d 235. The cases are inapposite. Each involved determinations made by the respective regulatory agencies to discontinue investigation proceedings long after the making of an evidentiary record. Indeed, in *Wisconsin* the court refers (p. 305) to that Commission's determination of the Section 4(e) dockets as a decision on the merits. In *Eastern* the court observed (p. 237) that the hearing was lengthy and

extensive. The challenge in the cited cases was to the agencies' authority to discontinue the proceeding without arriving at a definitive conclusion with respect to the rates under investigation. The cases that are pertinent to the issues presented here are not *Wisconsin* or *Eastern,* but those which hold that a Commission order which discontinues the proceeding may leave in force a directive contained in the same order or in another order which commands the carrier to cease and desist from applying certain rates. This Court has frequently reviewed decisions and orders of the Interstate Commerce Commission and has been asked to and has rendered justments as to the lawfulness of orders which had been entered in proceedings in which the same order or subsequent orders served by the Commission "discontinued the proceeding". Thus, *American Commercial Lines, Inc.* v. *Louisville & N. R. Co.,* 392 U.S. 571, reviewed an order of the Commission in *Ingot Molds, Pennsylvania to Steelton, Ky.,* 326 I.C.C. 77, which ordered schedules cancelled and the proceeding discontinued. The same was true in *I.C.C.* v. *New York, N.H. & H. R.R. Co.,* 372 U.S. 744. Here the court reviewed an order of the Commission rendered in *Commodities—Pan-Atlantic Steamship Corp.,* 313 I.C.C. 23, which ordered rates cancelled and the proceeding discontinued. The continuing effectiveness of orders issued by the Commission in those proceedings was not "annulled" by the issuance of an order stating that the proceedings had been discontinued.

CONCLUSION

Appellants suggest that the questions presented on this appeal are substantial and merit plenary review.

Respectfully submitted,

JOHN F. DONELAN
JOHN M. CLEARY
JOHN H. CALDWELL
914 Washington Building
Washington, D. C. 20005

Attorneys for Appellant,
The National Industrial Traffic League

ARTHUR A. ARSHAM
233 Broadway
New York, New York 10007

JOHN J. C. MARTIN
685 Third Avenue
New York, New York 10017

Attorneys for Appellants,
The National Small Shipments Traffic Conference, Inc. and Drug & Toilet Preparation Traffic Conference

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